Code. By the end of the 1975 plan year, the Local 705 Pension Fund had 15,732 active participants and 2,587 beneficiaries receiving benefits.

Respondent John Daniel (respondent) was a participant in the Local 705 Pension Fund on December 1, 1973 when, at age 63, he retired from employment with a Local 705 contracting employer (covered employment). His application for a normal retirement pension was denied by the trustees at hearings held on December 26, 1973 and March 28, 1974 because he had insufficient credited service to qualify for a normal retirement pension.[3]

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3. The single issue decided by the court below was " 'that the complaint alleges the sale of a security for purposes of application of the antifraud provisions of the Securities Acts, and that the complaint alleges violations of those provisions' " (A. 8). Thus, neither the clarity nor the reasonableness of the Local 705 Pension Fund eligibility rules was germane to the decided issue (A. 11). Nevertheless, the court of appeals stressed these irrelevant matters in strong and often unfair terms (A. 3 nn. 1 & 2; 5-7). With respect to the nature of the benefits and the promulgation, dissemination and application of the eligibility rules, the record, note 1 *supra*, reveals the following:

In 1955 the trustees provided one retirement benefit (known as a normal retirement pension) of $75 per month for life. Eligibility for receipt of this pension required the conjunction of four conditions: (1) Attainment of age 65; (2) Covered employment for twenty continuous, consecutive and uninterrupted years (the service rule); (3) Retirement from covered employment; and (4) Application to the trustees. The trustees granted each participant one year of credit toward the service rule for each continuous year of covered employment occurring before January 1, 1955 (past service credit).

As a result, respondent, who began covered employment in April 1950, received approximately five years of past service credits for which the Local 705 Pension Fund received no contributions. Additionally, the Local 705 Pension Fund became immediately obligated to pay lifetime pensions to forty-seven employees who retired in 1955 after meeting the eligibility requirements (including the service rule), and for whom the Local 705 Pension Fund had received little or no contributions by reason of the grant of full past service credits. For each of the forty-seven retirees, the Local 705 Pension Fund received a maximum of $104 of contributions, aggregating $4,888, and owed as the actuarial value of the pension

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B. The Proceedings in the District Court.

On October 3, 1974, respondent filed in the United States District Court for the Northern District of Illinois, Eastern Division (the district court), a five count class action complaint against the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the International Union) and petitioners.[4] Counts I and II of the complaint

(Footnote continued from preceding page.)

benefits $8,394 per retiree, or $394,518.00. The grant of full past service credits, and thereby pensions, to older employees with long and continuous service, without receipt by the Local 705 Pension Fund of substantial contributions to pay for them, mandated that the trustees require employment records for present and new employees which would meet the trust's actuarial funding requirements. *See Johnson* v. *Botica*, 537 F2d 930, 936 (7th Cir. 1976).

On December 5, 1960, when respondent had accrued approximately five years of past service credits and five years of covered employment and contributions to the Local 705 Pension Fund (future service), respondent was laid off. He returned to covered employment on July 5, 1961. Under the plan, he could have made the contributions for the period of layoff and thereby maintained his continuity of future service. However, during his absence from covered employment, respondent did not make any contributions to the Local 705 Pension Fund. As a result, respondent suffered a break in his pension service between December 5, 1960 and July 5, 1961 which cut off his accrued past and future service credits toward completion of the service rule.

At the date of retirement, respondent had accrued over twelve years (July 5, 1961—December 1, 1973) of credits toward the service rule. By that date, the normal retirement pension was $400 and the age for receipt had been reduced from 65 to 60 years.

4. Respondent sought a plaintiff class composed of the members of all local unions affiliated with the International Union which were parties to collectively bargained pension plans and all their present and former plan participants. The requested defendant class consisted of all local unions affiliated with the International Union which were parties to collectively bargained pension plans and the trustees of the pension funds. On June 7, 1977, the district court certified a plaintiff class under Rule 23(b)(2), Federal Rules of Civil Procedure, composed of

> all persons (1) who are now, or who were, members of Local 705 . . ., and who have purchased or otherwise acquired an interest in, through a contribution to or on whose behalf a

(Footnote continued on next page.)

alleged that all of the pension funds in the United States which, since 1955, were created through the process of collective bargaining between local unions affiliated with the International Union and employers had fraudulently misrepresented and failed to disclose to the millions of employee-participants, among other things, the material eligibility requirements for normal and vested pensions in violation of § 10(b) of the Securities and Exchange Act of 1934 (1934 Act), 15 USC § 78j(b); Rule 10b-5 of the Securities and Exchange Commission (the SEC), 17 C.F.R. 240.10(b)-5; and § 17(a) of the Securities Act of 1933 (1933 Act), 15 USC § 77(q) (the securities acts). The relief sought included deletion of the allegedly arbitrary eligibility requirements and a judgment requiring the payment of pension benefits withheld from respondent and his class.

Count III claimed that the conduct alleged in counts I and II breached the duty of fair representation owed by Local 705 and the other affected local unions to respondent and other union members under § 9(a) of the National Labor Relations Act (the NLRA), 29 USC § 159(a). Count IV was a catch-all claim of state common law fraud which attached only by the doctrine of pendent jurisdiction. Counts V and VI[5] alleged that the trustees of the pension funds had violated their fiduciary duty created by, and the "for the sole and exclusive benefit of the employees" mandate contained in, § 302(c)(5) of the Taft-Hartley Act, 29 USC § 186(c)(5).

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contribution has been made to, the Local 705 Pension Fund, which requires for the payment of a full retirement benefit a total period of service in excess of twenty (20) years.

The district court denied defendant class certification noting that Local 705 and the Local 705 Pension Fund "are the only ones against whom relief can be sought. Class certification is inappropriate since the defendants are no longer 'so numerous that joinder [of all] is impracticable,' Rule 23(a)(1)."

5. Count VI was added as an amendment to the complaint on February 3, 1975.

Petitioners[6] moved to dismiss counts I and II of the amended complaint because the relationship between a participant and the Local 705 Pension Fund does not involve the sale of a security, and § 17(a) of the 1933 Act does not create a private cause of action for fraud.[7]

On March 1, 1976, the district court entered a memorandum opinion and order denying petitioners' motion to dismiss. It held that § 17(a) of the 1933 Act creates a private cause of action for fraud.

On the issues of securities acts coverage, the district court noted that although the securities acts "offer no explicit answer to the question" whether a collectively bargained, mandatory, noncontributory pension trust fund "involve[s] an offer or sale of securities", they are "facially applicable" to such pension plan and the legislative history "discloses both Congress' and the SEC's recognition of this fact" (A. 62-63).

It concluded that respondent's interest in the Local 705 Pension Fund is an investment contract; i.e., "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party", *SEC* v. *W. J. Howey Co.*, 328 US 293, 298-9 (1946). First, respondent's services to the employer and what the district court viewed as respondent's agreement to allocate a portion of his wages to the Local 705 Pension Fund in the form of employer contributions represent the investment of respondent's money. Second, the "common enterprise" is

6. On January 28, 1976, the district court granted respondent leave to again amend the complaint by adding the remaining trustees of the Local 705 Pension Fund as parties defendant and as representative of the Local 705 Pension Fund. These defendants filed a motion to dismiss which is pending before the district court. With the joinder of the trustees, the Local 705 Pension Fund became a defendant below.

7. Because only the securities acts issues are presented to the Court, we shall not discuss either the arguments addressed to, or the district court's decision sustaining claim jurisdiction for, the remaining counts in the amended complaint.

created by the Local 705 Pension Fund trustees' management for the employees' mutual benefit of the monies invested by respondent and other participants. Finally, because the management of trust assets is committed to the trustees, pension benefits exceed contributions received on behalf of the individual employee, and the employee bears the risk that the Local 705 Pension Fund may be unable to pay the fixed benefit, the "expect[ation of] profits [arises] from the efforts of . . . a third party".

Having found the existence of a security in the relationship between respondent and the Local 705 Pension Fund, the district court next concluded that the Local 705 Pension Fund made a "sale" of that security to respondent. The respondent's services to the employer or the respondent's "agreement" to allocate a portion of his wages to the Local 705 Pension Fund in the form of employer contributions was a "disposition for value" as required by § 2(3) of the 1933 Act and § 3(a)(14) of the 1934 Act, notwithstanding that Local 705, as respondent's collective bargaining representative, negotiated the creation and funding of the Local 705 Pension Fund.

The district court found that "the SEC has taken the position" that a mandatory and noncontributory employee pension plan does not involve a sale (A. 73). The SEC rationale is that the purpose of the securities acts is to assure informed investment decisions by prospective purchasers of securities; the acts do not apply in the absence of an investment decision; and the nature of a mandatory and noncontributory plan precludes an investment decision (A. 64, 73). The district court rejected the SEC's position as suggesting an investigation into the employee's state of mind to determine whether he " 'desired' to make the purchase" (A. 75). After noting that the SEC makes no such subjective inquiry in any other area of the securities laws, it concluded that the investment decision is presumed from the act of purchase (A. 75).

Respondent had voluntarily acquired an interest in the Local 705 Pension Fund, said the district court, because the pension

plan is part of the total wage package bargained for by Local 705 and the decision whether to accept or reject the package resides with the employees.[8] Thus the Local 705 Pension Fund is a contributory voluntary plan despite the parties' agreement and the record to the contrary.[9]

Turning from *Howey* to policy considerations, the district court saw a "great need" (A. 71) for applying the antifraud provisions of the securities acts to the Local 705 Pension Fund to provide the degree and type of disclosure not present in federal pension legislation; i.e., the securities acts would complement existing pension acts.[10] The district court said that its ruling is limited to the securities acts' antifraud provisions and eschewed an intention to decide the applicability of the acts' registration requirements.

The district court overruled petitioners' motion to vacate the order but certified the securities acts issues for an interlocutory appeal pursuant to 28 USC § 1292(b).

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8. The district court said that the voluntariness of the employee's participation in the plan is not negated because a minority of employees are bound by the majority's vote.

9. Notes 1 & 2 *supra*. "In effect, without so stating, the [district] court found that the Local 705 Pension Fund was a contributory employee pension plan." Note, *The Applicability of the Anti-Fraud Provisions of the Securities Acts to Union-Negotiated Employee Pension Plans*, 2 J. Corp. L. 421, 425 (1977).

10. Welfare & Pension Plan Disclosure Act, 29 USC §§ 301 *et seq.*; Internal Revenue Code of 1954 § 401; Employee Retirement Income Security Act of 1974, 29 USC §§ 1001 *et seq.*; Taft-Hartley Act, § 302(c)(5), 29 USC § 186(c)(5). According to the district court, the disclosure mandated by the Internal Revenue Code is not in sufficiently understandable form for the ordinary investor; the Welfare & Pension Plan Disclosure Act was inadequate because the participant had to take the initiative in seeking the information whereas the securities acts place the disclosure burden on the pension fund; and the Employee Retirement Income Security Act of 1974, 29 USC §§ 1001 *et seq.*, regulates only the administration (post-entry) aspect of pension plans, thereby leaving the regulation of sales to employees (pre-entry) to the securities acts (A. 65, 66, 71, 72).

C. The Proceedings Before the Court of Appeals.

Petitioners and the International Union filed with the United States Court of Appeals for the Seventh Circuit (the court of appeals) a timely petition for permission to appeal, pursuant to 28 USC § 1292(b), the district court's order denying the motions to dismiss counts I and II of the amended complaint. The petition raised the substantive, novel and national ramifications of the district court's decision. Respondent acknowledged that this is "an exceptional and important case" (Response to Pet. for Permission to Appeal at 17), as did the Secretary of Labor,[11] the SEC[12] and others.[13] On June 17, 1976, the court of

11. The Secretary of Labor "advise[d] the [c]ourt that, if it should grant the petition for interlocutory review, the Secretary of Labor desires to present his views in a brief *amicus curiae*. In his opinion, the legal issues presented are of substantial importance to federal labor laws and labor relations policy" (Mot. of Secretary of Labor to File Brief Amicus Curiae). In his *amicus* brief, the Secretary of Labor posited the substantial conflicts with the national labor policy and "the serious danger . . . to continued operations of [pension] plans" posed by the district court's decision as follows:

> INTEREST OF THE SECRETARY OF LABOR.
>
> The court below held that participation in a collectively bargained, compulsory, noncontributory employee pension plan involves the sale of a security to the employee-participant, subject to the anti-fraud disclosure requirements of the Securities Act of 1933 and the Securities Exchange Act of 1934 (hereafter generally referred to collectively as "securities laws").
>
> The establishment and operation of employee pension plans through collective bargaining is regulated under the National Labor Relations Act and a variety of related statutes. Such plans are also comprehensively regulated by the Employee Retirement Income Security Act of 1974 (ERISA), which includes detailed provisions for disclosure.
>
> One ground for the decision below was the finding that union members buy securities—interests in a pension fund—when union and employer negotiate a pension plan. This finding is inconsistent with basic labor law doctrines that undergird national labor policy. It denies the union's status as exclusive bargaining representative, and would thus have a profound and unfortunate effect on the collective bargaining system. As the executive officer with principal labor relations

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appeals granted the petition, received briefs from *amici*, and permitted the Secretary of Labor and the SEC to participate in oral argument. On August 20, 1977, the court of appeals filed a fifty-four page opinion affirming the district court's decision and general mode of analysis.

First, the court of appeals found that because the employers' contributions "constitute a sector of the total employee compen-

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responsibility, the Secretary of Labor has a significant interest in seeking rejection of that finding. Although it is not the Secretary's purpose to address securities law questions *per se*, we submit that the decision below must be reversed because it attempts to rest the application of securities law on an erroneous conception of labor law.

There is a second basis for the Secretary's interest. Application of the scheme of regulation flowing from the securities laws to employee pension plans, on any grounds, would conflict with the regulatory scheme Congress recently constructed for these plans in ERISA. In its substantive provisions dealing with the generic "break in service" problem exemplified by Mr. Daniel's loss of his pension, ERISA carries out clearly identified Congressional policies balancing employee need against the danger that too much retroactive reform would bankrupt ongoing plans. The decision below would reverse the effect of ERISA, exposing pension plans to potentially ruinous new liabilities. The purported benefit of the decision below, more meaningful disclosure, is illusory; securities laws disclosure requirements would largely—and wastefully—duplicate existing ERISA provisions.

Congress found in ERISA that the continued well-being and security of millions of employees and their dependents are directly affected by the system of private employee benefit plans, and that private plans are also an important factor affecting the stability of employment and the successful development of industrial relations. As administrator of Title I of ERISA, the Secretary of Labor has a responsibility to carry out the provisions of ERISA in a manner that will preserve and enhance the private employee benefit plan system. Accordingly, the Secretary has a significant interest in informing this court not only of the conflict between the decision below and ERISA but also of the serious danger it poses to continued operation of plans, in exchange for mostly superfluous disclosure.

(Br. for Secretary of Labor Amicus Curiae at 1-4; footnotes omitted).

sation structure", citing *Inland Steel Co.*, v. *NLRB*, 170 F. 2d 247 (7th Cir 1948), "the investment of money prong of the *Howey* rule has been satisfied" (A. 15, 17).

Second, the Local 705 Pension Fund functions as a common enterprise because the employees have an undivided interest in the trust[14] "without . . . having certificates evidencing their

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12. In a motion, the SEC represented:

> The Commission has previously filed an *amicus curiae* brief in this action which addresses significant issues under the federal securities laws that are of vital importance to the Commission's ability to fulfill its statutory mandate to protect public investors. * * * Specifically, this case presents as one important issue the meaning and scope of a long-standing Commission interpretation of the federal securities laws which the Commission is uniquely qualified to discuss.* * *
>
> Finally, the Commission recognizes . . . that this case presents important and far-reaching issues of law. The resolution of these issues not only will have an impact upon private pension plans, but also may significantly affect the future regulatory policies of several government agencies, including the Securities and Exchange Commission.* * *

(Motion of SEC to Participate in Oral Argument).

13. Institute For Public Interest Representation ("The issues presented by this case are of great signficance and complexity . . ."); National Coordinating Committee for Multi-Employer Plans ("The retroactive implications of the decision of the court below . . . ,if upheld, seriously threaten the ability of these [2500] plans to continue providing benefits on an actuarially sound basis . . ."); The Gray Panthers ("The present action is a landmark case. . . . This case of first impression may bring about significant changes in the methods and structure of the pension industry which will affect the lives of millions of retired workers.") ERISA Regulations Industry Committee (The case presents "significant issues and most important implications. . . .").

14. The trust agreement, however, provides:

> ARTICLE 13.
>
> Vesting of Rights
>
> SECTION 1. No employee, or other person shall have any vested interest or right in the Trust Fund or in any payments from the Trust Fund; provided however, the rights of any person who has become eligible for benefits hereunder by fully meeting the requirements of this Trust Agreement shall

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interest or the power to transfer their interests in the trust" (A. 17) or control over the trust fund and investments. Third, because the value of the promised pension benefits exceeds the employers' contributions and is derived from the efforts of persons other than the employees, the pension benefits are "profits" within the meaning of *Howey* as refined in *United Housing Foundation, Inc.* v. *Forman*, 421 US 837 (1975).

Turning to a discussion of "[e]conomic reality," the court of appeals said that the Local 705 Pension Fund "resembles a mutual fund" (A. 22). Respondent's interest therein, which "is also like an interest in a variable annuity contract" (A. 23), is divisible; i.e., "the employment fringe benefits aspect of a pension can be separated from its security aspects" (A. 23). Because investments made by private pension plans are a significant force in the capital markets and "pension funds are the most efficient way for an employee to invest" (A. 24), if private pension plans are "exempt from the anti-fraud provisions of the securities laws, then policing of the capital markets is significantly neutralized" (A. 24).

It read legislative history subsequent to the securities acts and "the SEC's interpretation of the securities acts" (A. 25) as supporting respondent's interest in the Local 705 Pension Fund as an investment contract. As a matter of "policy", it justified Congress' failure to specifically mention pension plans because it said that "in the early 1930's pension plans were still a rarity" (A. 32). Nevertheless, because since 1955 "the asset value of pension plans" has grown and pension plans "are now the major, if not sole, form of investment for most American workers to provide for their old age and because of the now crucial role that such plans play in today's capital markets, they are just the sort of

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not be affected, changed, or altered by any amendment to this Trust Agreement, unless the Trust Fund, in the opinion of the Trustees, is inadequate to meet the payments due, in which event the Trustees shall determine whether such benefits shall be reduced or the Trust terminated.

investment vehicle that the securities acts were passed to regulate" (A. 33).

The court of appeals concluded that respondent's labor for his employer as a truck driver and the employer's contributions on his behalf for such labor resulted in a "disposition for value" between respondent and the Local 705 Pension Fund and a "sale" under the securities acts. Volition on the part of the employee is not a condition precedent to a sale; however, volition is found in union membership ratification of the collective bargaining agreement negotiated by Local 705 and in the employee's decision to accept and retain covered employment. The SEC advised the court of appeals that its position that employee participation in a noncontributory mandatory pension plan does not constitute a sale applies to the registration but not to the antifraud provisions of the securities acts. A majority of the court of appeals accepted the SEC's representation (A. 37-38). However, Judge Tone, concurring, found that the SEC had indeed changed its position and "has not been as candid as we might have hoped in acknowledging and explaining its change of position" (A. 52).

The court of appeals, following its prior decisions, concluded that § 17(a) of the 1933 Act creates a private cause of action. It then analyzed the relationship between the Employee Retirement Income Security Act of 1974 (ERISA), 29 USC §§ 1001 *et seq.*, and the securities acts, and the effect of its decision on the national labor policy.

The court of appeals erroneously attributed to the defendants and their *amici* the argument, which they had expressly disclaimed, that ERISA "has repealed[15] the anti-fraud provisions of the [securities acts] insofar as they apply to union pension funds", and concluded that no repeal had occurred (A. 42).

ERISA's savings clause and failure (1) to provide relief to the employee at the time the employee accepted employment

15. The court of appeals used the terms "repeal" and "preemption" interchangeably (A. 42, 43).

or ratified the collective bargaining agreement, or before ERISA's effective date,[16] or (2) to generally prohibit "the making of false or misleading representations to an employee concerning the pension fund"[17] (A. 46 n. 57), led the court of appeals to conclude that ERISA and the securities acts' anti-fraud provisions serve distinct and complementary purposes. Additionally, the timing, method and content of disclosure to employees is less stringent under ERISA than under the securities acts.[18] "Thus the antifraud provision of the securities acts will protect the interests of an investor before he makes an investment decision, while ERISA serves employees who have been employed for a substantial period of time at a job covered by a pension plan, protecting them from losing benefits through ignorance of the plan provisions" (A. 47).

The extensive arguments made by the Secretary of Labor and petitioners that the district court's decision seriously conflicts with the national labor policy were dismissed as "specious" (A. 49). In the court of appeals' view, a union's duty of fair representation and the purposes of § 302(c)(5) are supplemented and the national labor policy enhanced by requiring that employees be furnished pension plan information deemed relevant by a court.

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16. Section 514(b)(1), 29 USC § 1144(b)(1), provides that "[t]his section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975."

17. The court of appeals considered the civil enforcement powers granted to participants, beneficiaries and the Secretary of Labor in § 502(a), 29 USC § 1132(a), insufficient to enjoin petitioners' alleged fraudulent conduct.

18. E.g., "Affirmance of the judgment below will supplement ERISA by providing a self-executing compulsion to disclose adequate information at such times, including a statistically determinable risk that many employees covered by a plan will never receive their pension benefits" (A. 46-47). The Secretary of Labor's regulations fleshing out the requirement of § 102(b) of ERISA, 29 USC § 1022(b), that a participant be told "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits" were deemed inadequate by the court of appeals (A. 47 n. 58).

The court of appeals disclaimed an intention to require "the filing of any document or establish judicial control over pension fund operations" (A. 50). The burden placed upon pension funds by its decision should not be "undue" (A. 50-51). While rejecting an intent to apply the registration provisions to subject pension funds, the court below left that issue in a state of uncertainty (A. 50 n. 61). Also left to future litigation are "any possible obligations of employers under the 1933 and 1934 acts with regard to pension plans" (A. 50 n. 61).

The court below rejected three cases which are contrary to its and the district court's decisions, *Hurn* v. *Plumbing Retirement Fund*, 434 F. Supp. 80 (CD CA 1976); *Wiens* v. *Teamsters Union*, BNA Sec. Reg. and L. Rep. No. 397 at A-13 (CD CA 1977); *Robinson* v. *Mineworkers Health & Retirement Fund*, 435 F. Supp. 245 (DC 1977) (A. 20-21, 39 n. 43).

Judge Tone, led by "certain doubts", wrote separately that "this is a close and difficult case" and "I am beset by the same doubts arising from the ordinary meaning of the words 'security,' 'investment contract,' and 'sale' and from Congress' basic purpose in adopting the Securities Acts that must have influenced the several district judges who have reached conclusions inconsistent with ours" (A. 51). The relationship between respondent and the Local 705 Pension Fund "do[es] not fit neatly into the traditional concept of a sale of a security" (A. 51). "[I]t may well be" that the Court's recent decisions, including *United Housing Foundation, Inc.* v. *Forman*, 421 US 837 (1975), "indicate 'a pronounced disfavor with attempts to stretch the securities laws beyond their traditional scope' " (A. 51).

Judge Tone found the SEC's "former position" to apply to the antifraud provisions and that Congress, in post-securities acts legislation, "must have understood that they [the securities acts] did not apply to transactions of the kind before us" (A. 52). Nevertheless, the breadth of the securities acts' definitions (A. 51), Congress' understanding "that the SEC is not infallible" and that the applicability of the securities acts to mandatory

noncontributory pension plans "has yet to be determined by the Supreme Court," led Judge Tone to conclude that "Congress has chosen to leave the matter in that posture" (A. 53).

REASONS FOR GRANTING THE WRIT.

That the decision below poses problems of critical significance for the private pension system, the securities laws and the national labor policy is attested to by the parties before the court of appeals and the *amici*[19] including the Secretary of Labor and the SEC. For more than 40 years the SEC took the position that noncontributory mandatory employee pension funds are not subject to the securities laws. This settled interpretation has been repeatedly recognized and acquiesced in by Congress which in 1958 and 1974 enacted special legislation to specify the disclosure obligations of employee pension funds and other provisions for the protection of their participants. And the same interpretation has justifiably been relied upon by persons responsible for the administration of thousands of employee pension funds established by employers and labor organizations in the United States. At one stroke, the decision below has exposed all such pension funds to vast liabilities which could easily bankrupt them because of their failure to comply with requirements of federal securities laws heretofore regarded as inapplicable.

The impact of the decision below upon the private pension system is both pervasive and devastating. At least 473,272 private plans, covering millions of plan participants,[20] are now subject to "litigation under Rule 10b-5 [which] presents a danger of vexatiousness different in degree and in kind from that which

19. Notes 11-13 *supra.*

20. That number of plans filed Form EBS-1 in 1975 with the Secretary of Labor pursuant to ERISA. Two-thirds of the reporting plans have ten or less participants. The remaining plans provide coverage for ninety percent of the participants. U. S. Dept. of Labor News Release 76-1403, 4 Pens. Plan Guide (CCH) ¶ 23,391.

accompanies litigation in general," *Blue Chip Stamps* v. *Manor Drug Stores*, 421 US 723, 739 (1975). The federal courts will be inundated by private suits which, in the case of petitioners, could involve thousands of minitrials following class certification.[21]

The court below has stretched the securities laws beyond recognition by applying them to the labor market, an area in which they were never intended to apply. The decision is in conflict with recent decisions of the Court, particularly the teaching of *United Housing Foundation, Inc.* v. *Forman*, 421 US 837 (1975), that the reach of the federal securities laws should not be expanded beyond the particular area of economic activity which those laws were intended to regulate, the capital market of the enterprise system. By ignoring that principle, the court below has significantly distorted the securities laws and has created a serious threat to both the working of fundamental national labor policy and to the disclosure and regulatory scheme of ERISA.

The securities acts are not a panacea for every form of alleged fraud in every form of economic relationship. Rather, "[t]he focus of the Acts is on the capital market of the enterprise system: the sale of securities to raise capital for profit-making purposes, the exchanges on which securities are traded, and the need to prevent fraud and to protect the interest of investors." *United Housing Foundation* v. *Forman*, 421 US at 849. It is therefore essential that the securities acts be construed "against the background of their purposes," *ibid.*

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21. The court below held that each plaintiff class member must prove certain elements of an antifraud case including individual reliance (A. 50-51). The Local 705 Pension Fund had 15,732 employee-participants and probably countless former employee-participants within the certified plaintiff class. In addition, the present plaintiff class does not include claims for a disability pension or a vested pension, notes 3 and 4 *supra*. Post-*Daniel* cases are collected in Appendix A to the companion petition for a writ of certiorari filed by the International Union. The Local 705 Pension Fund is a defendant in *Dutchak* and *Papuga*.

As Judge Gesell recently noted, "*Forman* is but one of a series of recent Supreme Court decisions indicating a pronounced disfavor with attempts to stretch the securities laws beyond their traditional scope," citing *Santa Fe Industries, Inc.* v. *Green*, ... US ....., 51 L. Ed. 2d 480 (1977); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 US 723. *Robinson* v. *Mineworkers*, 435 F. Supp. at 247.

The court below failed to follow the teachings of *Forman*, both as to the basic principle of limiting the securities acts to the types of economic activity which Congress sought to regulate thereby and as to the overriding importance of economic reality as a guiding principle in applying the definition of an investment contract. It agreed that the Local 705 Pension Fund was established pursuant to § 302(c)(5)[22] of the Taft-Hartley Act. Obviously, the Local 705 Pension Fund, as a trust created and qualified for the exclusive purpose of paying retirement benefits to eligible employees and dependents, is not engaged in "the sale of securities to raise capital for profit-making purposes," *United Housing Foundation* v. *Forman*, 421 US at 849. It defies common sense and precedent for the court below —for the first time since the passage of the securities acts—to conclude that an employee's involuntary participation in a pen-

22. Section 302(c)(5), 29 USC § 186(c)(5), provides as pertinent:

> (c) The provisions of this section shall not be applicable * * * (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents . . .: *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, . . . pensions on retirement or death of employees * * *; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund * * *; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities * * *.

sion fund negotiated by his collective bargaining representative and funded by the employer " 'in our commercial world fall within the ordinary concept of a security,' " *id.* at 851. The employees, via Local 705, "in bargaining for establishment of the Trust, were obviously interested in creating a sound, comprehensive [pension] plan 'rather than making an investment for profit.' The Trust simply cannot be characterized as one of the 'countless and variable schemes devised by those who seek the use of money of others on the promise of profits' "[23] *Robinson*

23. The court of appeals pyramids the then $24 weekly employer contribution rate upon 7.5 percent compounded annual interest for twenty years to arrive at $25,000 per employee base contributions and $33,000 "profit over capital contribution. . . . An increase of 1% in return on a pension fund's capital can allow benefits to be increased by 20% (SEC Br. at 11)" (A. 19). This nonrecord arithmetic was presented to the actuarial consultant for the Local 705 Pension Fund, note 1 *supra*, who advised petitioners' counsel, first, that the "one percent" formula is but one actuarial rule of thumb to estimate the impact of a change in the investment return assumption upon the level of benefits which can be offered. The assumption, given that it also acts as a discount factor for future values, must be earned over forty or fifty years; i.e., a one percent increase in the rate of return over the actuarially assumed rate will not allow costs to be reduced or benefits increased unless it is earned over a long period of time. The twenty percent increase figure is extremely general and inapplicable when the group has large numbers of retirees and present beneficiaries as the Local 705 Pension Fund, *supra* at 4.

Second, the court of appeals assumed that all of the Local 705 Pension Fund assets would be deposited in savings and loan institutions. (Besides lacking insurance beyond the $40,000 limit, doing so could well run afoul of the fiduciary obligation imposed by § 404(c) of the Employee Retirement Income Security Act of 1974, 29 USC § 1104(c), upon the Local 705 Pension Fund trustees "by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so".)

There is further important error underlying the court of appeals' conclusion that a participant in a pension plan obtains "profits from the efforts of others" (A. 17). The court below mistakenly attributes to the International Union a concession which it did not make, and as to which the underlying facts are entirely different from what the court of appeals stated them to be. The court of appeals declared: "A substantial part of the gain (which even defendants concede to be at least 25%) will derive from traditional

(Footnote continued on next page.)

v. *Mineworkers*, 435 F. Supp. at 247. It is more realistic to conclude that the Local 705 Pension Fund can promise the benefits because of the pooled contributions from all participating employers, *Sheetmetal Workers Local 5* v. *Mahoning & Trumbull Bldg. Trades Welfare Fund*, 541 F. 2d 636, 639 (6th Cir 1976); *Crawford* v. *Cianciulli*, 357 F. Supp. 357, 372 (ED Pa 1973), forfeitures of employees who do not qualify, *Assaione* v. *Carey*, 473 F. 2d 199, 205 (DC Cir 1972), and increased weekly contributions (from $2.00 in 1955 to $30.00 in 1977) negotiated by Local 705 and the employers.

Fuller discussion of the failure of the court below to follow the approach of *Forman* and the artificiality of its investment contract analysis is to be found in the companion petition filed by the International Union. In this petition, we wish to focus on the way in which the court below has misread both the prior

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(Footnote continued from preceding page.)
return on the pension fund participant's investment, a dollar-profit element in the form of capital gains, interest, dividends, and other accumulated earnings realized from the trustees' management of the pension fund." (A. 19, citing pp. 10-11 of the International Union's brief.) What was actually said in that brief, however (based on an affidavit of the Local 705 Pension Fund's actuary), was "that an employee retiring in 1975 under the Local 705 Pension Plan had retirement benefits with a then current actuarial value of $57,951, of which only $14,542 was attributable to contributions to the fund resulting from his own employment and interest on those contributions. (App. 184a-8). In other words, only one-fourth of the current value of his expected pension benefits was in any way traceable to his own employment, and the remaining three-fourths resulted from contributions made with respect to other employees covered by the plan". In other words, the 25% figure represents not what the court of appeals calls the "traditional return on the pension fund participant's investment," but the *total* of that "return" and the "investment". The underlying figures to which the International Union's brief referred show further that of the $14,542 (or 25%), $9,510 was the accumulated contributions paid on behalf of the employee and only the remainder, $5,032, constituted the interest thereon. Thus, less than 9% of the entire benefit value constitutes the investment "profit" on the money paid into the fund. It is on the basis of this 9% that the court of appeals characterized the Local 705 Pension Fund as an enterprise in which a covered employee obtains "profits from the efforts of others" (A. 17).

understanding of the securities acts by the SEC and key parts of the securities acts and their legislative history. We shall also treat the problems posed by the decision below for the national labor policy and the resulting conflict with the scheme of disclosure and regulation embodied in ERISA.

The record in this case is ripe to decide the issues. The posture of this case is like that in *United Housing Foundation, Inc.* v. *Forman*, 421 US 837, where the district court dismissed the complaint, the court of appeals reversed and remanded, and the Court granted the petition for a writ of certiorari in advance of trial. The deleterious effects in this case in terms of precedent and sheer numbers far surpass those in *Forman*.

Finally, the Court can decide whether § 17(a) of the 1933 Act creates an implied private cause of action for fraud; an issue which has split the courts of appeals and was left open by the Court.

I.

THE DECISION BELOW IMPROPERLY APPLIED THE FEDERAL SECURITIES LAWS TO THE RELATIONSHIP BETWEEN AN EMPLOYEE AND A COLLECTIVELY BARGAINED, MANDATORY, NONCONTRIBUTORY PENSION PLAN.

The court of appeals' reading of the 1970 amendments to the 1933 and 1934 Acts is critical to its approach. For the clear implication which runs through its opinion is that the court of appeals would hesitate to read the acts in such a way as to impose liability on all noncontributory pension plans because of their failure to register under § 5 of the 1933 Act and § 12(g) of the 1934 Act. However, a determination that a particular activity involves the sale of a security would, on the face of the securities acts, bring their registration as well as their antifraud provisions into play. The solution which the court below offers to this difficulty was to find that in the 1970 amendments to Section 3(a)(2) of the 1933 Act and 3(a)(12)

of the 1934 Act, Congress codified a long standing SEC view that most such plans were exempt from registration but not from the antifraud provisions of the acts. The court of appeals thus accepted the SEC's contention that its present assertion of coverage is not inconsistent with its prior interpretation of the securities laws. The historic record unmistakably refutes that position.

The most important evidence of the prior understanding consists of the SEC's disclaimers of jurisdiction late in the 1950's and the early 1970's, when what became the Welfare & Pension Plan Disclosure Act (WPPDA) and ERISA were under consideration, as well as the SEC's actual practice—which was a total failure to exercise the regulatory authority which it told the court below it has always had and always thought it had. See Part II B of the International Union's Petition.

However, the court below determined that "Congress has evidenced agreement with the SEC's position that interests in pension funds are securities by way of the Investment Companies Amendments Act of 1970. Recognizing that interests in employee pension funds are 'securities,' in 1970 Congress decided to exempt them from the registration requirements of Section 5 of the 1933 Act * * * *if the employee pension fund was maintained by a bank or in a separate account maintained by an insurance company.*" (A. 27) (emphasis added).

According to the court of appeals, Congress manifested this intention by virtue of § 27(b) of the 1970 Act which amends § 3(a)(2) of the 1933 Act.[24] The 1970 amendment has nothing whatsoever to do with this case: It deals only with single and collective trust funds maintained by a bank or in a separate account maintained by an insurance company; these its exempts from registration but not from the antifraud provisions. The amendment was drafted to deal only with the question of whether banks and insurance companies are required to register their sales of interests in trust funds which they maintain for

24. § 27(b) is reprinted at A. 86.

employee pension plans. It does not address and therefore says nothing at all about the status of interests in the pension plan itself; that issue was not then considered.

The court of appeals stated that that interpretation (as rephrased by it) is valid only with respect to earlier versions of the 1970 Act, including that which passed the Senate, and which exempted

> any interest or participation in a collective trust fund maintained by a bank or in a separate account maintained by an insurance company which interest or participation is issued in connection with * * * a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under section 401 of the Internal Revenue Code of 1954.

According to the court of appeals, the House Subcommittee which next considered the bill "altered the focus of the exemption to encompass interests in the underlying pension funds" by adding the phrase "single or" to precede the phrase "collective trust fund maintained by a bank." It would be inappropriate in this petition to set forth even a major portion of the legislative history which shows that the addition of this phrase had no such sweeping purpose. However, three points will suffice at the very least to raise serious doubts concerning the court of appeals' interpretation.

1. It is reasonable to suppose that if the subcommittee thought it had made a significant change in the bill by adding "single or", its Report to the full House would have so stated; yet, that Report did not even mention the addition of these two words; its explanation of the bill was identical to that of the Senate Committee prior to the change.[25]

But it is not necessary to rely on inference. For the meaning of the change from the Senate bill was the subject of a colloquy in the House debate between Congressman Springer, the rank-

25. Compare H.R. Rep. No. 91-1382, 91st Cong., 2d Sess., 43 with S. Rep. 91-184, 91st Cong., 1st Sess., 27.

ing minority member, and Congressman Moss, the chairman of the subcommittee; it was there stated that the House bill differed from the Senate bill only "slightly", in that "a single trust maintained by a bank" where the trusts assets were *not* commingled with those of other qualified trusts would *also* be exempted from registration under the securities laws; that is, they would be treated like "collective trusts maintained by a bank" under the Senate bill.[26]

The court of appeals correctly quotes the Conference Report which, with a further change,[27] approved the House version. The court opined that the administrative view which was being codified was that "although interests in pension funds did not need to be registered in most cases, they are nonetheless securities" (A. 32). Its citation of the Springer-Moss colloquy (n. 26 *supra*) for that proposition is inexplicable.[28] The administrative practice

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26. MR. SPRINGER. The second question: Section 27(b) of the bill provides an exemption from registration under the Securities Act of 1933 for interests or participations in trust funds maintained by banks for funding certain stock bonus, pension or profit-sharing plans which meet the requirements for qualification under section 401 of the Internal Revenue Code. I understand that this bill differs slightly from the bill passed by the Senate in that it would make it clear that interests in a single trust maintained by a bank where the trust assets were not commingled with those of other qualified trusts would also be exempted from the registration requirements of the Securities Act. I understand that the SEC has required registration of interests and participations in such trusts funds where employee money is used to buy securities of the employer or companies affiliated with the employer. I understand that this bill would not prevent the SEC from requiring registration of interests or participations in such trust if that also were the case. Am I correct?

MR. Moss. The gentleman is correct. It is my understanding that that is what was intended.

116 Cong. Rec. 33287 (Sept. 23, 1970).

27. We also disagree with the court of appeals' interpretation of that change and a subsequent change in a later bill presented by Senator Sparkman.

28. The SEC for its part did not rely on the colloquy; indeed, it made no reference there to the colloquy, although it was obviously the most direct and authoritative explanation of the amendment on which is based its argument.

which Mr. Springer expressly mentioned is one with respect to bank maintained trust funds "where employee money is used to buy securities of the employer * * *," which, of course, is not relevant here.

2. The court of appeals' interpretation is on its face a grave indictment of the legislative process. It is not a light thing to charge that Congress had casually shifted the "focus" of a proposal "to settle the legal status of certain commingled investment accounts maintained by banks and insurance companies" (A. 30) into a sweeping determination that interests in all pension plans should be deemed securities and subject to the antifraud provisions of the securities laws despite a long-settled understanding to the contrary. It is likewise a startling suggestion that Congress did so, as the court below says, in response to a single letter from the counsel for one corporation, without hearing from other companies, or from labor organizations, pension plan administrators and others which would be affected thereby and without any other study of the consequences of such a profound expansion. And it stretches credulity to maintain that Congress would take such a giant step without at the very least stating in a committee or conference report or authoritative floor debate that that is what it has done.

3. In the court below, the SEC argued that under its interpretation of the 1970 exemption all pension funds which are qualified under § 401 of the Internal Revenue Code would be exempt from registration, a figure which it estimated at 96% of all plans. This interpretation of the 1970 amendment ignores its language which restricts the exemption to funds "maintained by a bank or in a separate account maintained by an insurance company . . .". The court of appeals did not repeat this error. Without expressly noting its disagreement with the SEC, it placed a narrower interpretation on the amendment, namely that its effect was to exempt pension funds which are "being maintained by a bank" (A. 27). While this version at least does

business with the language of the amendment, it raises very serious difficulties of its own. It does not explain why Congress should have chosen to create two classes of pension funds—those maintained by banks and insurance companies and those which are not—and exempted the former but not the latter from registration. While the court of appeals accepted respondent's assertion that "most employee pension plans are bank maintained" (A. 29 n. 35), the percentage of funds which are not maintained either by a bank or a separate account maintained by an insurance company is substantial, and under the court of appeals' view, these plans would be subject to both the registration and antifraud provisions of the securities laws. Moreover, since the court of appeals' theory was that Congress was codifying an SEC administrative practice, it is significant that the SEC did not even argue, let alone establish, that it ever administratively differentiated between pension funds which are "maintained by a bank * * *" and other pension funds with respect to registration or otherwise. Thus, the SEC's interpretation is irreconcilable with the statutory language, and the court of appeals' version attributes to Congress the intent to codify an administrative practice whose existence no one has ever suggested.

Only petitioners' interpretation of the 1970 amendment avoids both horns of this dilemma. It explains the reference to administrative practice in the Conference Report and, more conclusively, it explains why Congress used the phrase "maintained by a bank." When a bank or insurance company maintains a fund for a pension plan, the plan's interest in the fund is a security which the bank (or insurance company) sells to the trustees of the pension plan.[29] That transaction, therefore, is one where registration would be required in the absence of a statutory exemption. On the other hand, since as of 1970, neither the

29. In that situation there are two relationships: 1) that between the bank and the plan trustees', and 2) that between the trustees and the employees who are the plan participants; it is only the former which involves "the purchase and sale" of a "security".

SEC nor anyone else had held that there is a sale of a security when an individual accepts or continues employment where there is a mandatory, noncontributory pension plan, there was no perceived reason for requiring registration of such a plan.

In 1971, the SEC published the SEC Institutional Investor Study (Study). In a portion of the Study which "discuss[es] the manner in which the federal securities laws applied to pension benefit plans in the years leading up to and during the period covered by this Study" (at 995, footnote omitted), the following appears under the heading, "a. The Securities Act of 1933":

> *(1) Corporate pension and profit-sharing plans—(a) Plans not providing for voluntary contributions.*—In the case of plans which are unfunded (pay-as-you-go basis plans) and in the case of plans where contributions to the funding medium consist of either employer money only or employee contributions which are required as a condition of employment, the Commission staff has taken the position *that the Securities Act does not apply* because there is no "sale" or "offer for sale" of a security. Although the employees' interests in the plan (whether the plan's assets are invested through a funding medium or consist solely of an obligation of the employer recoverable from the general assets of the employer) may be recognized to be "securities" within the Act, the absence of a volitional element on the part of the employees in acquiring these interests is the basis for the position. While this result may not be compelled by the statutory definition of "sale," the result is consistent with the basic scheme of the Act to provide would-be purchasers with information adequate to make an informed opinion as to whether to purchase—assuming that there is a real difference between employer and employee contributions.[30]

The Study's reference to "the Securities Act" rather than to its registration provisions was not inadvertent. In the next subsection, "(b) Plans providing for voluntary employee contributions" (*id.* at 997), the Study described the SEC's no-action position with respect to "registration" of participations in certain

30. *Id.* at 996 (footnotes omitted, emphasis added).

voluntary contributory plans. Thus, at least as late as 1971, the SEC was taking the position that the entire 1933 Act, rather than just its registration requirement, was inapplicable to mandatory noncontributory pension plans. The argument that in 1970 Congress had codified an administrative view that the antifraud provisions were applicable cannot be squared with this evidence.

The court of appeals conceded that the legislative histories of the original securities acts are "silent on the question" whether pension plans of the type here at issue are covered by the acts[31] (A. 25). It finds coverage by Congress' rejection in 1934 of a Senate amendment to § 4 of the 1933 Act. The legislative history of the discredited amendment, however, proves only that Congress wished to continue the registration of offerings made by an "issuer" to employees in the form of a *stock* bonus or *stock* investment plan.[32]

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31. It explained the silence by the assumption that private pension plans were then insignificant. The facts are otherwise. "In 1930 about 2.7 million active workers were covered by provisions of private retirement plans, and about 100,000 retired workers were receiving regular pension payments. Annual benefit payments (including refunds and lump sum payments) totaled $90 million, and the funds accumulated for private retirement plans amounted to $800 million. These totals exclude railway employees, whose pension plans in 1930 were privately administered, but who in 1935 came under the Federally-administered Railroad Retirement System." American Council of Life Insurance, *Pension Facts 1976* at 8. Few of the genuine "investments" which were discussed in the legislative history or expressly included in the definition of "security" were owned by a comparable percentage of the population or involved aggregate assets of comparable size. The explanation therefore is the more obvious one, that such coverage was too remote from the subject matter of the legislation to be mentioned.

32. On May 12, 1934, Senator Hastings introduced, and the Senate adopted, an amendment to § 4(1) of the 1933 Act adding a third subsection and exempting from registration

> an offering made solely to employees by an issuer or by its affiliates in connection with a bona fide plan for the payment of extra compensation or stock investment plan for the exclusive benefit of such employees.

(Footnote continued on next page.)

In 1941, the House of Representatives' Committee on Interstate and Foreign Commerce held hearings[33] on H. R. 5065 which amended § 3(a) of the 1933 Act to exempt from registration employee benefit plans. The SEC Commissioner Purcell expressed his view that Congress' rejection of the 1934 Senate amendment evidenced Congress' intention that an employee pension plan involving a sale between the employee and the plan—thereby excluding a plan such as the Local 705 Pension Fund—was an investment contract for purposes of the securities acts' registration provisions.[34] Thus, Mr. Purcell's testimony did not, as the court of appeals' description conveys, extend to pension plans generally and stopped well short of mandatory, non-

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73 Cong. Rec. 8708 (1934). The court of appeals substituted "employees *of* an issuer or *of* its affiliates" (A. 25; emphasis added) for "by", and thereby more easily concluded that the issuer must be the employee's employer. Nevertheless, the critical error is the court of appeals' failure to find in the Conference Report which it cites that employee extra compensation plan and employee stock investment plan meant *only* an employee *stock* purchase plan. *See* A. 27 n. 32.

When the Senate amendment was presented to a conference committee

> [t]he conferees eliminated the third proposed amendment to this subsection on the ground that *participants in employees' stock-investment plans* may be in as great need of the protection afforded by the availability of information concerning the issuer for which they work as are most other members of the public.

H. R. Rep. No. 1838, 73d Cong., 2d Sess. 41 (1934) (Emphasis added). The court of appeals, by excising the italicized part of the report from its opinion, finds support that the "as great need of the protection" language shows congressional intent to cover employee pension plans of the type at issue here (A. 25). Such employees were in the same need of the protection of the securities laws as any other purchasers of the stock, and it was for that reason that Congress in 1934 rejected a proposal to exend the "private offering" provisions of § 4(1) of the 1933 Act to such plans. See *SEC* v. *Ralston Purina Co.*, 346 US 119, 125-126 (1952).

33. Hearings on Proposed Amendments to Securities Act of 1933 and the Securities Exchange Act of 1934, 77th Cong., 1st Sess. (1941) (1941 Hearings).

34. 1941 Hearings at 895-6, 904-5.

contributory plans. Moreover, since Congress did not act on the SEC's proposal, no inference of congressional acquiescence in his interpretation of the 1934 Act is permissible.

The court of appeals erred when it held, first, that the SEC had consistently interpreted the securities acts' antifraud provisions as encompassing an employee's interest in a noncontributory mandatory pension fund, and, second, that the SEC's current interpretation to that effect is entitled to judicial deference. The universal understanding, until the SEC's *amicus* brief to the court of appeals, was that the SEC eschewed antifraud coverage of an employee's interest in a pension fund like the Local 705 Pension Fund.[35] Therefore, the court of appeals gave inappropriate weight to the SEC's novel position. *Compare United States* v. *National Ass'n of Securities Dealers*, 422 US 694, 717-8 (1975); *Chemehuevi Tribe* v. *FPC*, 420 US 395, 408 (1975); *SEC* v. *New England Electric System*, 384 US 176, 185 (1966) (applying the administrative deference rule to an agency's tenured interpretation) *with Santa Fe Industries, Inc.* v. *Green*, ... US ....., 51 L. Ed. 2d at 491 n. 12; *Piper* v. *Chris-Craft Industries, Inc.*, ... US ....., 51 L. Ed. 2d 124, 153 n. 27 (1977); *United Housing Foundation, Inc.* v. *Forman*, 421 US at 858 n. 25 (SEC's current position not entitled to judicial weight.

II.

THE DECISION BELOW THAT EMPLOYER CONTRIBUTIONS TO THE LOCAL 705 PENSION FUND ARE THE EMPLOYEES' MONIES CONFLICTS WITH DECISIONS OF THE COURT AND A COURT OF APPEALS.

The court below concluded that respondent was an investor in and that a sale had occurred with the Local 705 Pension Fund because respondent's monies[36] in the form of employer

35. *Supra* at 8, 14; *Robinson* v. *Mineworkers*, 435 F. Supp. at 247 n. 3.

36. Although the court of appeals referred to the contributions as being "a sector of the total employee compensation structure"

(Footnote continued on next page.)

under the Securities Investor Protection Act of 1970" (A. 14). The court below, however, ignored the following observations in *Morgan, Kennedy* which apply with equal force here:

> We are hard pressed to discern *any* of the usual traits of a customer relationship between the employee-beneficiaries and the debtor. Black's *Law Dictionary* (4th Ed., 1951) defines a 'customer' as
>
> > One who regularly or repeatedly makes purchases of, or has business dealings with, a tradesman or business house. Ordinarily, one who has had repeated business dealings with another. A buyer, purchaser, or patron. (citations omitted)
>
> "The employee-beneficiaries in the case before us made no purchases, transacted no business, and had no dealings whatsoever with the broker-dealer in question respecting the trust account. Indeed, they could not have any such dealings since the broker-dealer held no property belonging to any individual employee, in which such employee could trade or invest. Calculable amounts were payable to Reading's employees only in the event that, pursuant to the terms of the Plan, they became entitled thereto. The argument that, notwithstanding their complete anonymity and total incapacity to have dealings with the broker-debtor, the Reading employees were 'customers' of Morgan-Kennedy stretches that term wholly beyond its limits.

Id. at 1318. *Morgan, Kennedy* both conflicts with the decision below and is consistent with the language in § 2[40] of SIPA that SIPA and the 1934 Act are to be read in *pari materia*.[41] *See*

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40. Except as otherwise provided in this chapter, the provisions of the Securities and Exchange Act of 1934 . . . apply as if this chapter constituted an amendment to, and was included as a section of, such act.

15 USC § 78bbb.

41. The court of appeals considered *Klamberg* v. *Roth*, 425 F. Supp. 440 (SD NY 1976), as "[m]ore relevant" to support the conclusion that the employee-beneficiary is an investor in a non-contributory, mandatory pension fund. *Klamberg*, however, was concerned only with the issue whether a "beneficiary of a trust has standing to bring an action based on § 10(b) of the [1934 Act] . . .

(Footnote continued on next page.)

Massachusetts Financial Services, Inc. v. *SIPC*, 545 F. 2d 754, 756 n. 3 (1st Cir 1976).

III.

THE DECISION BELOW SIGNIFICANTLY DISTORTS THE NATIONAL LABOR POLICY AND SUPERIMPOSES THE SECURITIES ACTS UPON CONGRESS' DISCRETE JUDGMENTS EMBODIED IN ERISA.

The national labor policy orders the relations among the employee, the collective bargaining representative and the employer, and legitimatizes employee benefits plans created via collective bargaining. The decision below drastically and impermissibly alters these relations and upsets Congress' careful and delicate balance between (1) the principle of collective bargaining and the rights of union members, and (2) securing additional rights for employee plan participants while preserving the integrity of the nation's private pension system. The results are a severe distortion of the principle of collective bargaining; the superimposition of an additional administrative agency and an inapt statute onto the specialized and well regulated labor-management field[42]; and a plethora of litigation of the types previously eschewed by the Court.

(Footnote continued from preceding page.)
against the trustees of the trust," *id.* at 441, for "[f]raud perpetrated by a trustee in the purchase or sale of securities on behalf of the trust," *id.* at 443; an issue neither raised below nor presented to the Court.

42. While the court of appeals brushed aside these arguments as "specious", Senator Williams, a major force in ERISA's design and passage, said:

> I am troubled by the cavalier fashion in which the Court of Appeals dealt in its decision with the labor relations and collective bargaining ramifications that could flow from application of the Securities Acts' antifraud provisions to collectively bargained plans

BNA D. Lab. Rep. 184 at X-2 (Sept. 21, 1977).

A. The Decision Below Seriously Impairs the Exclusive Representative Status Accorded to Local 705 by the NLRA.

The core of the national labor policy is the principle which "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 US 175, 180 (1967). The effectuation of that principle allows the union to bargain away valuable employee rights, *ibid.*, and rejects a limited exception even in the vital area of the "elimination of racially discriminatory practices," *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 US 50, 65 (1975). "Wages, hours, working conditions, seniority and job security therefore become the business of certified or recognized bargaining agents * * * [whose] broad authority in negotiating and administering effective agreements is 'undoubted' " and subject only to the duty of fair representation. *Hines* v. *Anchor Motor Freight, Inc.*, 424 US 554, 563, 564 (1976).

Section 302(c)(5) of the Taft-Hartley Act excludes from the criminal proscriptions of § 302(a) employer contributions paid to a trust fund established by the employees' collective bargaining representative. Subsection (c)(5)(B) requires that the "basis on which such payments are to be made is specified in a written agreement" between the union and the employer who "are equally represented in the administration of such fund." Thus § 302(c)(5) says that the creation, funding and administration of the employee benefit trust fund is the business of the employees' collective bargaining representative.

This theme is repeated in § 9(a) of the NLRA, 29 USC § 159(a), where the union is "the exclusive representative of all the employees in such [appropriate bargaining] unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." The

creation and funding of an employee pension plan are mandatory subjects for bargaining as being within the ambit of the union's exclusive function as the employees' statutory representative. *Inland Steel Co.* v. *NLRB*, 170 F. 2d 247, 249 (7th Cir 1948), *aff'd on other grounds sub nom., Communication Workers Union* v. *Douds*, 339 US 382 (1950). Thus, whether the employers' contributions to the Local 705 Pension Fund and like plans are labeled as "wages" or "compensation", § 302(c)(5) of the Taft-Hartley Act and §§ 8(a)(5), 8(b)(3), 29 USC §§ 158(a)(5) and (b)(3), and 9(a) of the NLRA make their creation, amount, nature, and continuation the exclusive function of Local 705 and other certified or recognized unions.

The court of appeals, however, abrogated the principle of *collective* bargaining by holding that the individual employee, not his statutory representative, retains unfettered authority over a mandatory subject for bargaining under the NLRA and a function committed to the union by § 302(c)(5). Under the court of appeals' construct, the recognized or certified union is no longer the *exclusive* representative of all the employees as mandated by § 9(a).

The court of appeals' new principle cannot be restricted to the subject of employer contributions to employee pension benefit plan. Either the national labor policy, as embodied in the labor statutes and the Court's decisions, commits to the employees' designated representative *exclusive* bargaining authority over § 9(a) subjects or it does not. The court of appeals says that it does not. Where the Court would not carve out an exception to the exclusive representation principle in the vital area of the elimination of racial discrimination, the court below has easily done so in a less significant area.

As a result of the court of appeals' abrogation of the basic tenet of the national labor policy, the potentiality for embroiling the federal courts in extensive litigation is significantly

enhanced,[43] *cf. Buffalo Forge Co.* v. *Steelworkers Union*, 428 US 397, 411 n. 12 (1976), while the voluntary adjustment policies in §§ 203(d) and 204(a) of the Taft-Hartley Act, 29 USC §§ 173(d) and 174(a), are significantly diminished.

Finally, the concept of union democracy, most recently embodied in the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 USC §§ 401 *et seq.*, will be frustrated. The court of appeals noted that its decision concerning the effect of membership ratification of the contract[44] on its concept of a

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43. Further litigation under the securities acts is engendered even if the court of appeals' decision is restricted to employer contributions to § 302(c) plans. These plans, via subsection (A), encompass trusts to pay employee and dependents "medical or hospital care . . . compensation for injuries or illness resulting from occupational activity . . . or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance;" via subsection (6), to pay "pooled vacation, holiday, severance or similar benefits" or apprenticeship or other training programs; and by subsections (7) and (8), to pay for scholarships, child care centers and group legal services. Each of the trusts, by virtue of § 302(c)(5), will be structured and funded in whole or in part, as is the Local 705 Pension Fund. Thus, it may be that all § 302(c) plans are subject to the securities acts principles stated by the court below. *Cf. Inland Steel Co.* v. *NLRB*, 170 F2d at 249.

44. In determining that there is no "volitional" requirement to the definition of "sale", the court below analogized an employee's voting to ratify a collective agreement which provides for employer contributions to a pension plan to a stockholder's vote to approve a corporate merger. The latter is now treated as a "sale" under SEC Rule 145, 17 C.F.R. § 230.145. The unsoundness of this analogy is clear from the SEC's explanation of the Rule:

> In voting, each consenting stockholder is expressing his voluntary and individual acceptance of the new security, and generally the disapproving stockholder is deferring his decision as to whether to accept the new security or, if he exercises his dissenter's rights, a cash payment. The corporation action *in these circumstances*, therefore, is not some type of independent fiat but is only the aggregate effect of the voluntary decisions made by the individual stockholders *to accept or reject the exchange.*

Securities Act Release No. 5246, CCH Fed. Sec. L. Rep. [1971-1972 Decisions Transfer Binder] ¶ 78,753, p. 87,567 (emphasis added to show the court's elisions in the sentence from which it

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security and sale could well engender a movement away from that democratic principle. However, it was relatively unconcerned with the effect of such action upon the members. The decision below on this point highlights both the conflict between the securities acts and the national labor policy and the inappropriateness of engrafting capital markets concepts onto the specialized and sensitive labor and management fields.

B. ERISA, Not the Securities Acts, Was Congress' Discrete Answer to the Problems of Pension Plan Reporting and Disclosure, Participation and Vesting, and Fiduciary Responsibility. The Decision Below Conflicts with the Decision of Another Court of Appeals.

If the derogation of the tenured principles of the national labor policy is not sufficient to warrant the Court's review and reversal of the decision below, then the effect on ERISA should. The court of appeals' decision conflicts with ERISA in the areas of disclosure and plan structure.[45] It justifies the decision on the ground that ERISA does not deal with the employee's decision to take the job, i.e., the time when the sale occurs. The premise is not correct.[46]

(Footnote continued from preceding page.)
quoted). The union member's vote to ratify acceptance of a collectively bargaining agreement is cast in an entirely different statutory environment. Whereas the shareholder votes as a matter of right under state corporation law, federal labor law does not give the union member a right to vote on ratification. Moreover, unlike the dissenting shareholder, the employee cannot, by his negative vote, opt out of the agreement and receive "a cash payment" if it is ratified by a majority; that is the very essence of the collective bargaining principle established by § 9(a) of the NLRA.

45. A. 46 & n.n. 55-57, 47 & n.n. 58, 59; note 11 *supra*.

46. *See* 2 J. Corp. L. at 434.

Section 2[47] of ERISA evidences Congress' clear intent to address the nub of respondent's complaint, i.e., lack of disclosure, arbitrary vesting terms and diversion of plan assets. Congress' intent became ERISA's four titles. Title I—Protection of Employee Benefit Rights—contains five subparts dealing with reporting and disclosure, participation and vesting, funding, fiduciary responsibility, and administration and enforcement. Section 502(a), 29 USC 1132(a), permits the Secretary of Labor or a participant or beneficiary to bring suit to redress violations of the trustees' fiduciary duties, or to enjoin any act or practice which violates ERISA, or by a participant against a pension plan as an entity to recover benefits.[48] Title II amends

47. Section 2, 29 USC § 1001, provides as pertinent that Congress' purposes in passing ERISA were:

* * * * *

(b) to protect . . . the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

* * * * *

(c) to protect . . . the interests of participants in private pension plans and their beneficiaries by improving the equitable character and soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

48. The civil enforcement provisions of § 502 became effective on September 2, 1974, several months before respondent filed suit. S. Rep. No. 93-127, 3 U. S. Cong. & Admin. News (1974) at 4872. If the regulatory and enforcement provisions of ERISA were not effective until after respondent filed suit, those provisions were the basis for deciding the motion to dismiss. *Cf. United States* v. *Alabama*, 362 US 602 (1960). In the *Alabama* case, the government sued Alabama under the 1957 Civil Rights Act. The district court dismissed the suit because the act did not authorize suit against a state. The court of appeals affirmed. While the case was pending before the Court, the act was amended by § 601(b) to expressly authorize

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the Internal Revenue Code. Title III allocates jurisdiction between the Secretary of Labor and the Secretary of the Treasury. Title IV deals with plan termination insurance.

Throughout the complaint respondent says that the Local 705 Pension Fund plan requires not only a lengthy and arbitrary vesting period but also continuity of covered employment. In other words, it takes too long to vest a pension and the pension credits are not "portable," i.e., cannot be taken over to, or credited with, service for a non-contracting employer. Part 2 of ERISA, 29 USC § 1051-1061, minutely details new minimum vesting requirements, establishes standards for determining years of credited service, drastically curtails forfeitures for breaks in service, and permits suits to enjoin violative procedures. Congress, however, specifically *declined* to legislate pension credit portability, leaving to the Joint Pension Task Force "to study the means of providing for the portability of pension rights among different pension plans," ERISA, § 3022(a)(2), 29 USC § 1222(a)(2).

The claimed omission deemed to be critical by the court of appeals is the failure of the Local 705 Pension Fund to state the actuarial basis and probabilities upon which the plan is constructed. However, § 103(d) of ERISA, 29 USC § 1023(d), requires that the Local 705 Pension Fund file an annual report containing "a complete actuarial statement applicable to the plan year."

"The length and detail of [ERISA] indicate that the regulation of pension funds with regard to such matters as vesting and procedural rights is a complex task more appropriate for Congress than for the courts." *Lugo* v. *Employees Retirement Fund,*

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suit against a state. In reversing, the Court held that "[u]nder familiar principles, the case must be decided on the basis of law now controlling and the provisions of § 601(b) are applicable to this litigation." *Id.* at 604. *Alabama* dictates that the district court should have applied ERISA to the suit at least as "the basis of the law now controlling" the request for prospective relief.

529 F. 2d 251, 255 (2nd Cir 1976), *cert. denied*, 429 US 826 (1976). The principles enunciated in *Lugo* run counter to those stated in the decision below. Additionally, the superimposition of the SEC and the securities acts upon the Secretary of Labor, Treasury Department and ERISA "would be the imposition of another layer of federal regulation of the same subject matter, with the inevitable potential for conflicts,"[49] *NAACP* v. *FPC*, 425 US 662, 673 1976) (Burger, C.J. concurring).

The court of appeals decided that plan participants deserve protection not afforded by ERISA or the labor statutes. It saw Congress' efforts in that regard—although complex and careful —as being less than it would have enacted. And so, after over forty years of experience under the securities acts, the court of appeals amended the acts to suit its value judgments. The results are mass confusion for plan administrators, employers and unions, and judicial encroachment upon Congress' prerogatives.

IV.

THE DECISION BELOW THAT SECTION 17(a) OF THE 1933 ACT CREATES AN IMPLIED PRIVATE CAUSE OF ACTION FOR FRAUD CONFLICTS WITH THE DECISION OF ANOTHER COURT OF APPEALS.

The decision below that § 17(a) of the 1933 Act creates an implied private cause of action for fraud conflicts with the decision in *Shull* v. *Dain, Kalman & Quarl, Inc.*, CCH Fed. Sec. L. Rep. [Cum. Vol. 1977-78 New Court Dec.] ¶ 96,152 (8th Cir 1977). *Shull* represents the majority view that no private cause

49. As put by Congressman Dent, a chief architect of ERISA:

> Other parts of ERISA require careful review at this time. A recent Federal court [district court] decision raises the specter that yet another Federal agency, the Securities and Exchange Commission, will become involved in the regulation of employee benefit plans, a result clearly unintended when we enacted ERISA. Certainly Congress must be prepared to act if in fact this case is not reversed on appeal.

BNA, Daily Labor Reporter No. 174 at A-6 (September 7, 1976).

of action lies under § 17(a).[50] The issue was left open by the Court. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 US at 733 n. 6. The issue whether a private cause of action may be inferred from a statute has been the subject of several recent Court decisions. *SIPC* v. *Barbour*, 421 US 412 (1975); *Passenger Corp.* v. *Passengers Assn.*, 414 US 453 (1974).

The Court has recently recognized that Congress, in enacting § 10(b) of the 1934 Act, did not consider "the problem of private suits under it at the time of its passage," *Blue Chip Stamps* v. *Manor Drug Stores*, 421 US at 729; that "[w]hen we deal with private actions under Rule 10b-5, we deal with a judicial oak which has grown from little more than a legislative acorn," *id.* at 737. The legislative history gives strong indication that § 17 "was intended only to afford a basis for injunctive relief and, on a proper showing, for criminal liability, and was never believed to supplement the actions for damages provided by §§ 11 and 12." *SEC* v. *Texas Gulf Sulphur Co.*, 401 F. 2d 833, 867 (2nd Cir. 1968) (Friendly, J., concurring), *cert. denied*, 394 US 976 (1968). The Court should not permit § 17 to become by default another § 10(b) and rule 10b-5.

The court of appeals' finding of an implied cause of action under § 17(a) simply because "the definitions of a 'sale' and 'security' have been met by this complaint" (A. 41) is too facile and ignores the Court's mandate that the inference must be ascertained from the statute's legislative history and consistent "with the effectuation of the purposes to be served by the Act," *Passenger Corp.* v. *Passengers Ass'n.*, 414 US at 458.

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50. *Greater Iowa Corp* v. *McLendon*, 378 F. 2d 783, 790 (8th Cir 1967); *Person* v. *New York Post Co.*, 427 F. Supp. 1297 (ED NY 1977); *Lincoln Nat. Bank* v. *Lampe*, CCH Fed. Sec. L. Rep. [1976-77 Transfer Binder] ¶95,637 (ND Ill 1976), citing *Reid* v. *Mann*, 381 F. Supp. 525 (ND Ill 1974); *Russell* v. *Travel Concepts Corp.*, CCH Fed. Sec. L. Rep., 1975-76 Dec. ¶95,230 (MD Tenn 1975); *Welch Foods, Inc.* v. *Goldman, Sachs & Co.*, 398 F. Supp. 1393 (SD NY 1974); *Ferland* v. *Orange Groves of Florida, Inc.*,

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The § 17(a) issue alone warrants review in this recurring area of securities acts litigation. When taken together with the monumental issues raised under § 10(b) of the 1934 Act and rule 10-5, review of the § 17 question is a necessity. The decision below flouts the direction taken by the Court in private suits under the 1934 Act and the teachings which would deny that by § 17 Congress created another private cause of action for fraud.

CONCLUSION.

The Court should grant the petition, issue a writ of certiorari, and reverse the decision below. Respondent may proceed with the remaining federal and state claims.

Respectfully submitted,

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CCH Fed. Sec. L. Rep. 1974-75 Dec. ¶ 94,821 (MD Fla 1974); *Hardy* v. *Sanson*, 356 F. Supp. 1034 (ND Ga 1973); *Dyer* v. *Eastern Trust & Banking Co.*, 336 F. Supp. 890 (Me 1971); 3 Loss, *Securities Regulations* at 1785-6 (1961); Horton, *Section 17(a) Of The 1933 Securities Act—The Wrong Place For A Private Right*, 68 Nw. U. L. Rev. 44 (1973). *Contra, Katz* v. *Amos Treat & Co.*, 411 F. 2d 1046, 1056 n. 10 (2nd Cir 1969) (dicta); *Dorfman* v. *First Boston Corp.*, 336 F. Supp. 1089 (ED Pa 1972).

contributions, or his labor as a truck driver for the employer, was consideration to the Local 705 Pension Fund. The conclusions are inconsistent with the principle that employer contributions to an employee benefit trust are not the employee's wages, *Joint Industry Board* v. *United States*, 391 US 224 (1968); *United States* v. *Embassy Restaurant*, 359 US 29 (1959); *SIPC* v. *Morgan, Kennedy & Co., Inc.*, 533 F. 2d 1314 (2nd Cir 1976), *cert. denied*, 426 US 936 (1976); that pension payments are not compensation for services rendered, *Alabama Power Co.* v. *Davis*, ... US ....., 52 L. Ed. 2d 595 (1977); and that human labor cannot be equated with money, *cf. Meatcutters Union* v. *Jewel Tea Co.*, 381 US 676 (1965).

In *Joint Industry Board* and in *Embassy*, the Court ruled that unpaid contributions in the hands of a bankrupt and owed to the trustees of an employee benefit plan created pursuant to § 302(c)(5) are not entitled to a priority as wages due workmen under § 64(a)(2) of the Bankruptcy Act, 11 USC § 104(a)(2).[37] The Court's rationale was based on the employee's lack of control over the contributions, the basis upon which the payments are made, and the trustees' exclusive management of the funds. *United States* v. *Embassy Restaurant*, 359 US at

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(A. 15), it treated them as the employees' wages. *E.g.*, "Realistically speaking, employees are putting *money* into a fund for an employee's future use which *he would otherwise be getting in his paycheck*" (A. 15-16; emphasis added; A. 37 n. 41). It cited *Inland Steel Co.* v. *NLRB*, 170 F. 2d 247 (7th Cir 1948), as authority that employer pension fund contributions are part of the employees' compensation for purposes of the securities acts investor and sale analyses. *Inland Steel*, however, holds only that an employee pension plan is a mandatory subject for collective bargaining under the NLRB, *Alabama Power Co.* v. *Davis*, 52 L. Ed. 2d at 604 & n. 16; *Chemical Workers Union* v. *Pittsburgh Plate Glass Co.*, 404 US 157, 159 & n. 1 (1971), as "other conditions of employment", *Bartmess* v. *Drewrys*, 444 F. 2d 1186, 1188 (7th Cir 1971).

37. For § 64(a)(2) purposes, union dues deducted from the employees' pay in the hands of the bankrupt employer are entitled to a priority as wages. *Matter of Westmoreland Mfg. Co.*, 59 LC ¶ 13,054 (ED Pa 1968); *Matter of Ram Table Co.*, 35 LC ¶ 71,725 (ED NY 1958).

32-33. The Court did not consider whether the employee's ratification of the collective agreement made the contributions their monies. Rather, consistent with the national labor policy,[38] the Court looked to the intention of "the parties to the collective agreement," *ibid.*, i.e., the union and the employer.

The court of appeals' conclusion that respondent was an "investor" in the Local 705 Pension Fund also runs counter to the decision in *Securities Investor Protection Corp.* v. *Morgan, Kennedy & Co., Inc.*, 533 F. 2d 1314. *Morgan, Kennedy* said that an employee-beneficiary of a profit sharing plan is not a "customer" of a bankrupt broker-dealer within the meaning of § 6(c)(2)(A)(ii)[39] of the Securities Investor Protection Act of 1970 (SIPA), 15 USC § 78aaa *et seq.* After finding that "customer" in SIPA and "investor" in the securities acts are synonymous terms of art, *id.* at 1317, the court noted that the debtor broker-dealer, who held funds of the profit sharing trust for investment in securities, was unconcerned with the "financial relationship insofar as the Plan is concerned", *id.* at 1318; that the account was in the trust's name; and that the trustees had exclusive dominion over the trust assets. The facts impelled the conclusion that the trust represented by the trustees collectively, rather than the employees, was the debtor's customer. *Ibid.*

The court below dismissed *Morgan, Kennedy* as irrelevant to the question whether employee pension plan participants are investors within the meaning of the 1933 and 1934 Acts. Its stated reason was the "*sui generis* definition of customer/investor

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38. *Infra.*

39. As pertinent, § 6(c)(2)(A)(ii), 15 USC § 78fff(c)(2)(A)(ii), provides:

> "customers" of a debtor means persons (including persons with whom the debtor deals as principal or agent) who have claims on account of securities received, acquired, or held by the debtor from or for the account of such persons * * *, and shall include persons who have claims against the debtor arising out of sales or conversions of such securities, and shall include any person who has deposited cash with the debtor for the purpose of purchasing securities * * *.